SERVED: October 20, 2004

NTSB Order No. EA-5117

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of October, 2004

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. CHIN YI TU, Respondent.	Docket SE-16909

OPINION AND ORDER

The respondent has appealed from a July 29, 2003 written decision[1] of the law judge that granted a motion by the Administrator for dismissal of respondent's appeal as untimely.[2]

[1]A copy of the law judge's decision is attached.

[2]Respondent's appeal to the full Board relates to his appeal of two orders of suspension, which appeal the law judge concluded had not been filed on time, that is, within 20 days after service of the orders on the respondent. Both orders involve allegations of low flights by two different helicopters operated by respondent on the same date in the vicinity of Mt. Rushmore National Monument and Crazy Horse Mountain. Each order sought a 120-day suspension of respondent's Airline Transport Pilot Certificate Number 001824544.

Because we find no error in the law judge's conclusion that the respondent has not established good cause for the tardy filings, the appeal will be denied.[3]

The facts upon which this appeal is based will not be repeated here, as they are thoroughly recounted in the law judge's well-reasoned decision. Respondent argues, in effect, that he would not have filed late if the orders of suspension had been served on him by both certified and first-class mail, instead of by just certified mail alone, since first-class mail would have been forwarded to him while he was away on travel from his official address.[4] Even if this were so, however, it would not excuse the late filings, because, among other things, the Administrator was not obligated to serve the respondent in multiple ways and constructive service of an order of the Administrator is valid under our rules of practice.[5]

Moreover, if receipt of certified mail were a problem for the respondent, while traveling out of the country or otherwise, he could have so advised the Administrator, rather than assuming (if he did) that the orders of suspension (whose appeals he filed late) he had recently requested be sent to him would be provided by first-class as well as by certified mail. In other words, respondent could have easily insured that while away on business

---

[3]The Administrator has filed a reply opposing the appeal.

[4]Apparently, and curiously, respondent did not authorize his employees to receive or retrieve certified mail attempted to be delivered to him in his absence.

[5]See Rule 821.8(d)(2), 49 C.F.R. Part 821.

he would be kept apprised of all relevant information in an enforcement matter he knew was underway and in which he was expecting important documents.

For these reasons and those cited by the law judge, we agree that respondent did not act with the diligence warranted under the circumstances and, thus, did not establish that his tardiness was excusable for good cause shown.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied; and

2. The decision of the law judge is affirmed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and HERSMAN, Member of the Board, concurred in the above opinion and order. CARMODY and HEALING, Members, did not concur. HERSMAN, Member, submitted the following concurring statement. HEALING, Member, submitted the following dissenting statement.

Concurring Statement of Member Hersman

Since arriving at the National Transportation Safety Board three months ago, there have been a number of cases in which timely filing, or the lack thereof, has been the deciding factor in the disposition of the cases. The decision the Board Members have been asked to make is whether or not the regulatory authority and the respondent have complied with the outlined process. Generally this process has been determined by, and is clearly understood by, government officials who have longstanding experience and knowledge of the system, the procedures, and the precedents. It appears, at least in the cases I have reviewed in the last three months, that the respondents do not have the same understanding of the system, and in particular that they are not fully cognizant of the importance of the timely filing requirement.

There are several issues that I would like to raise with respect to the existing process: 1.) service of process, 2) timeliness/deadlines, 3.) merits of the case. First, with respect to service issues, respondents in Administrator v. Tu and Administrator v. Colley raise concerns about the methods of service utilized by the Federal Aviation Administration. In Tu there were different and inconsistent methods utilized to contact

the respondent. For example, certified and first class mail were used in the various attempts to contact the respondent, at times both methods were employed by the FAA and at other times only one method was used. In Colley, the respondent raises Section 821.8 (d)(1) and (d)(2), addressing the presumption of lawful service:

> Section 821.8 (d) Presumption of Service. There shall be a presumption of lawful service:
> (1) When receipt has been acknowledged by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under Section 821.7(f); or
> (2) When a properly addressed envelope, sent to the most current address in the official record, by regular, registered, or certified mail, has been returned as unclaimed or refused.

It is essential that federal authorities have the ability to serve complaints, but a respondent cannot file a timely appeal if they are unaware of the charge against them, specifically if they have not been served.

Second, with respect to timeliness and deadlines, the fact that a response is required within 10 days for emergency action or 20 days of service of the complaint is based <u>on the date of mailing</u>, not on the date of service. This item is critical and I believe often misunderstood. I am aware that the FAA and the Safety Board are making efforts to clarify this in their communications with respondents, but the fact the the 10 or 20 day clock starts ticking upon the date of mailing, not the date of receipt, creates a much abbreviated timeline for response. In Administrator v. Harris, it was alleged by the respondent that the emergency order was received 7 days into the 10 day appeal period. Given the mobility of the population that these regulations are intended to cover and the time that it may take for them to receive the complaint, it may be impractical to assume that pro se respondents have an opportunity to prepare a formal response or to hire counsel to file a response during the established time frame, as was alleged in Harris.

Finally, on the third point, I understand that early in the Board's history, there was a preference for deciding cases on the merits. After many years of this practice a decision requiring respondents to show "good cause" for missing deadlines was strictly adhered to, thereby resulting in findings against citizens because of lack of compliance with the process not due to the lack of merits. If a respondent files a tardy appeal because they did not have the complaint in their possession in time to meet the deadline, I question if the standard for presumption of service is appropriate. If the Safety Board has reversed its practice of deciding cases on merit because of

decisions made by the courts, then we must ensure that the service of complaints is fair and efficient because the very nature of the process may result in citizens not being afforded due process.

In closing, I do want to acknowledge the importance of having a workable system. It is important that all of the regulatory agencies take appropriate and necessary action to ensure the safety of our transportation system. We expect and rely on their enforcement activities to address unsafe operators or unsafe operations. I do not advocate any diminution of their authority. However, I remain concerned that the communication methods and the complaint and appeal process from the respondent's point of view are opaque. Every effort should be made to provide citizens with due process and it is incumbent on all of us involved in enforcement proceedings to review the systems that have been established and ensure that they are fair and reasonable. I will look for opportunities to address this matter in future cases before the Board.

Dissenting Statement of Member Healing

Staff has recommended denying the appeal on the procedural basis that Tu did not respond in the allocated time and that he did not establish sufficient cause for his failure to file a timely appeal. I do not agree with staff or the ALJ in this case, which once again illustrates how the FAA's reliance on a flawed system of delivery can cause confusion and potentially unwarranted damage to an airman's livelihood. In at least two previous cases, FAA's use of mail services available in the Postal system left questions as to when the intended recipient actually received an important notice[6] and when a response might

[6]In *Administrator vs. Duchek* (Notation #7555), the FAA approved a process that used regular mail to notify a small business owner of a random drug test requirement. Lacking a Return Receipt, there was potential to question the certainty of delivery and time of receipt. Although in the *Duchek* case it was clear that the mail had been received, there was no certainty as to date/time when that occurred, and there was no specific date/time by which the important drug test had to be performed. Because of the lack of certainty, the Board said, "Without the latter specificity, the rules are open to uncertainty in their application and an element of this important program could be the subject of time consuming and unnecessary litigation." The United States Court of Appeals, in vacating the NTSB's decision against *Duchek*, along with other considerations paid significant attention to the uncertainty at to date/time of notification of a requirement of drug testing was actually delivered and lack of a date/time certain for such testing to be accomplished.

actually be due[7].

In this case, two serious mail system flaws are evident. First, FAA used an ineffective method of notifying Mr. Tu or his agents of the FAA's intention to suspend his Airline Transport Pilot Certificate for 240 days. Notification of Attempted Delivery (PS Form 3849) was left at the address, indicating that neither Mr. Tu nor his agents were present at the time delivery was attempted; and therefore no one ever "received" the FAA's orders.

The PS 3849 forms were incomplete and/or unreadable, to the point of being practically meaningless. One PS 3849 had no entry in the block marked "SENDER", and the rest of the note was mostly illegible. The second PS 3849 was equally illegible, including the entry in the "SENDER" block, which clearly did NOT indicate that the mail was from the "FAA". There is no reason to doubt that Mr. Tu had made arrangements for his First Class mail to be forwarded to him while he was out of the country. Further, it is reasonable to conclude that Mr. Tu's agents could not, because the PS 3849s were seriously flawed, make the connection that important mail had indeed come from the FAA and that it should therefore be picked up and immediately forwarded to Tu.

The second flaw is that the 20-day window in which to file an appeal begins when the FAA puts the Notification order into the Certified Mail system. The FAA does not have the ability to know exactly when or in what condition their order will arrive into the hands of the intended recipient; thus they cannot assure the amount of time that will be available to appeal. The right to appeal should not be held hostage by the performance or non-performance of the method for serving Notice chosen by the FAA.

These two flaws combine to create a situation where the burden of proven service is on the individual being served the order, and not on the government to assuredly serve the order.

In addition, the order from the FAA should clearly reflect that actual date by which the appeal should be filed

---

[7]In *Administrator vs. Decuir* (Notation #7570), the respondent's appeal was filed 9 days after his receipt of Certified Mail that instructed him to appeal to the NTSB "within 10 days of service of the order". What was not clear to the respondent, which the Board pointed out to the FAA in its decision, was that the "official" interpretation of "service" is the date on which the order is placed in the postal system as Certified Mail, and NOT the date of actual receipt by the respondent. The Board urged "the Administrator whenever practicable to advise recipients of orders of the date by which an appeal to the Board must be submitted", which would eliminate misinterpretation of the "date of service".

(Administrator vs. Decuir). This would eliminate the misconceptions of those who would understandably assume that service of the order begins upon receiving their order.

When there is action against a certificate holder that will have a large impact on the recipient's livelihood, it is imperative that there is a system in place that will ensure that appeals are decided on the merits and not on a procedural basis that relies –at least in part – on a seriously flawed process for serving notice.